In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 605

ABE LIPSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1962 (Pet. App. 8). The petition for a writ of certiorari was filed on November 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction for conspiracy to steal, receive, possess, conceal and transport goods stolen in interstate commerce.

2. Whether the cross-examination of the petitioner was proper.

STATEMENT

Petitioner and five others were indicted for conspiracy to steal, unlawfully transport, convert to their own use, receive, possess and conceal goods in violation of 18 U.S.C. 371, 659, and 2314. The indictment was dismissed as to one co-defendant, and the other four co-defendants pleaded guilty, with the result that petitioner alone was tried. Petitioner was found guilty and was sentenced to imprisonment for one year. The judgment was affirmed on appeal.

At the trial the government presented evidence which tended to prove that some weeks prior to the theft the co-defendants, Gianatiempo, LoSasso, DeLellis and Murro, agreed that Gianatiempo would steal a loaded tractor-trailer and deliver it to a prearranged destination, and that LoSasso and DeLellis would dispose of the stolen merchandise, the proceeds to be divided among the four men (R. 17-19, 32, 45-46). That night LoSasso met with the petitioner and discussed the possibility of disposing of some stolen merchandise. Petitioner set the price he would pay at twenty-five per cent of the wholesale value (R. 32-33). Then petitioner and LoSasso exchanged tele-

phone numbers (R. 33). Prior to the theft, LoSasso, accompanied by Gianatiempo, met again with petitioner who inquired whether Gianatiempo knew what merchandise would be on the trailer and whether there was any possibility of obtaining whiskey (R. 20-21). Gianatiempo described the method of operation at the freight terminal and told petitioner that it was impossible to know what was on a specific trailer since all the trailers were sealed (R. 21). Petitioner stated that he would pay twenty-five per cent of the wholesale value regardless of the kind of merchandise (R. 34). After the theft, petitioner, accompanied by LoSasso, visited the garage where the stolen merchandise was hidden. He examined some of it and told LoSasso to ascertain the dollar value by totaling up the packing slips (R. 36-39). Two days later petitioner introduced Anthony Agresti who offered to purchase the merchandise for $3,000 (R. 23, 35, 40-42). Before the sale could be consummated the parties were arrested and the property recovered.

Petitioner took the stand in his own defense. He admitted exchanging telephone numbers with LoSasso before the theft (R. 63) and visiting the garage at 231 Laird Avenue in Cliffside Park, New Jersey, to examine the merchandise (R. 66). Petitioner's defense was that he did not know the goods were stolen (R. 72). On cross-examination, when government counsel inquired of petitioner if he had been interrogated by the officers who had arrested him, petitioner replied that he had (R. 75). He was then asked what his reply had been, and he answered, "I don't know from nothing" (R. 77). In rebuttal the gov-

ernment called an agent of the Federal Bureau of Investigation who testified that petitioner, when arrested, said that he had gone to New Jersey to get money because he was financially hard-pressed and that he did not know where 231 Laird Avenue was (R. 90).

ARGUMENT

1. Petitioner's attack on the sufficiency of the evidence was fully reviewed by both the district court (R. 52-61) and the court of appeals (Pet. App. 5-7) and found to be without merit. The evidence was clearly sufficient to support a finding that petitioner, although not an original member of the conspiring group, joined the conspiracy before it was consummated by the theft of the tractor-trailer and that he assumed an important and indeed essential function in the conspiracy by assuring his confederates that if they proceeded with their plans to steal the trailer they would be able to secure for the stolen merchandise the money which was their ultimate objective. Petitioner's role in the venture showed the type of "informed and interested cooperation" which this Court has held sufficient to make one liable as a conspirator. *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713.

Neither *Bollenbach* v. *United States*, 326 U.S. 607, nor *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2), on which petitioner relies is apposite. The opinion in *Bollenbach* held erroneous a charge by the trial court that possession of goods shortly after the theft raises

a presumption, not only that the possessor was guilty of the theft itself, but also of the interstate transportation of the stolen goods. Here there was direct evidence of petitioner's participation in the conspiracy before the theft as well as after, and there is no issue as to any presumption. In *Andolschek* there was no conspiracy common to all parties. In the present case all the efforts of all the defendants tended to effect a common purpose—the theft of a trailer and the disposition of its load. That the conspirators performed different acts did not splinter the conspiracy into several different conspiracies. *Lefco* v. *United States*, 74 F. 2d 66 (C.A. 3).

2. Petitioner's contention that he was prejudiced by his cross-examination as to what he said at the time of his arrest is refuted by the facts summarized in the Statement. The purpose of government counsel's cross-examination was not to convict petitioner by his silence, but to impeach petitioner's credibility by showing prior inconsistent statements which the government knew petitioner had made to an F.B.I. agent. It is well settled that such questioning is proper cross-examination. 3 Wigmore, *Evidence*, §§1017, 1018 3rd ed. 1940); McCormick, *Evidence*, §§33-40 (1954).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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